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No. 75-176

In the Supreme Court of the United States

OCTOBER TERM, 1975

HOUSTON ENDOWMENT, INC., PETITIONER

v.

JOHN T. DUNLOP, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner contends (1) that the equal pay provisions of the Fair Labor Standards Act, as added, 77 Stat. 56, 29 U.S.C. 206(d)(1), are inapplicable, since the work performed by its male and female employees was not shown to be substantially identical; (2) that it was denied due process because the district court's injunction was overly broad; and (3) that it was denied due process because the district court ruled against it from the bench.

This action was brought by the Secretary of Labor in the United States District Court for the Southern District of Texas, to enjoin petitioner from violating the equal pay provisions of the Fair Labor Standards Act, *supra*.

The evidence showed that petitioner owned, operated and managed several office buildings in Houston, Texas (A. 2).[1] It employed a number of male and female custodial employees to clean offices, restrooms, corridors and stairwells of the buildings in the evenings. The female custodial employees had responsibility for either cleaning or vacuuming and cleaning. Those who only vacuumed were assigned six floors of a particular office building; they were required to carry vacuums from floor to floor (A. 51).

Those who cleaned and vacuumed ordinarily were assigned two floors (Tr. 29). They were required to vacuum all rugs and spot clean them by hand (A. 34, 35), to dry mop all tiled floors (A. 76, 172), to empty trash cans into a bag attached to a large wheeled supply cart which they pushed from office to office (A. 38, 39, 78), and to spot clean walls, polish doorknobs and desks, dust venetian blinds and clean women's lavatories on each of the assigned floors (A. 73, 76, 164, 172).

The male custodians also had responsibility for vacuuming and cleaning (A. 55, 156; Tr. 243-245, 262-263). Some of them were assigned to vacuum

[1] "A." refers to the joint appendix of the parties in the court of appeals. "Tr." refers to the trial transcript.

only; others to clean and disinfect the men's lavatories (A. 67, 133; Tr. 77, 389); the rest of the male custodians were assigned to clean, scrub and wax tiled floors with the use of adaptable motor-driven machines (Pet. App. C-3).

The female custodial employees were paid $0.10 per hour less than the male custodial employees (Pet. App. C-4).

The district court found that the men and women performed janitorial work which, although not identical, was so "substantially similar" as to meet the Act's "equal work" concept (Pet. App. C-6; A. 20); that use of the machines by some of the male custodial employees required no greater skill, responsibility or effort than that required of female custodial employees in performing their duties (*ibid.*); and that petitioner had not offered "any objective evidence that the duties performed by men as a class required greater effort over a significant period of time than that performed by women as a class so as to justify any wage differential" (*ibid.*). The court concluded that petitioner therefore violated the equal pay provisions of the Fair Labor Standards Act (Pet. App. C-7). It enjoined petitioner from committing further violations and, pursuant to the Act, awarded restitution to certain of the female custodial employees (Pet. App. D-1—D-6). The court of appeals affirmed *per curiam* (Pet. App. A-1).

1. a. Petitioner contends (Pet. 10) that the equal pay provisions of the Fair Labor Standards Act are inapplicable to the instant case, since the district

court did not find that the work performed by male and female custodial employees was "substantially identical." It is well established, however, that the test for determining whether the Act's "equal work" concept is applicable is whether the jobs are closely related and job performance requires "equal skill, effort, and responsibility" and "similar working conditions" (29 U.S.C. 206(d)(1)). See also *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 198-200. Contrary to petitioner's contention, no court that has considered the issue has required that the work to which male and female employees are assigned must be substantially identical before the equal pay provisions are applicable. See *Brennan* v. *City Stores, Inc.*, 479 F.2d 235, 238, n. 8 (C.A. 5); *Hodgson* v. *Fairmont Supply Co.*, 454 F.2d 490, 493 (C.A. 4); *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259, 266 (C.A. 3), certiorari denied, 398 U.S. 905; *Hodgson* v. *Miller Brewing Co.*, 457 F.2d 221, 227 (C.A. 7).

In the instant case, although male and female custodial employees were assigned to different duties, their duties were closely related and there is ample evidence supporting the district court's conclusion that their work required equal skill, effort, and responsibility, and was performed under similar working conditions. The evidence showed that both sexes were responsible for cleaning and vacuuming—tasks which required the same kind and amount of physical exertion, which were equally routinized, and which required no particular skills.

b. Petitioner also contends (Pet. 7-9) that the Act does not permit a court to look behind an employer's

job classifications if there is a reasonable basis for them. In the instant case, however, there was no finding that petitioner's classifications were "reasonable" or based upon any factors other than the sex of the employees.[2] Once the Secretary has demonstrated that the work being performed by male and female employees is substantially equal in skill, effort and responsibility, the burden then shifts to the employer to show some factor other than sex which justifies the salary disparity. *Corning Glass Works* v. *Brennan*, *supra*, 417 U.S. at 204. Petitioner failed to meet this burden.

2. Petitioner contends (Pet. 13-18) that it was denied due process because the district court's injunction was not limited to the establishments and employees involved in the litigation. It is well established, however, that an injunction "should operate as an effective deterrent to a repetition of the unlawful conduct" (*United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 186; *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192-193). A company-wide decree is particularly appropriate where, as here, the violations are shown to be the result of company policy and are found at several separate establishments controlled by the employer (Pet. App. C-1—C-2). See, *e.g.*, *Brennan* v. *J. M. Fields, Inc.*, 488 F.2d 443 (C.A. 5), certiorari denied, 419 U.S. 881; *Tobin* v. *Frost-Arnett Co.*, 13 WH Cases 566, 34 CCH Lab.

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[2] Although the compliance officer stated that there was a "reasonable basis" to "argue" that the jobs were not equal (Pet. 7-8), the Secretary of Labor made no such determination.

Cas. ¶ 71,220 (W.D. Tenn.), affirmed, 264 F.2d 246 (C.A. 6); *Chambers Construction Co.* v. *Mitchell*, 233 F.2d 717, 725 (C.A. 8); *J. P. Stevens & Co.* v. *National Labor Relations Board*, 380 F.2d 292 (C.A. 2), certiorari denied, 389 U.S. 1005; *National Labor Relations Board* v. *Great Atlantic & Pacific Tea Co.*, 408 F.2d 374 (C.A. 5).

The injunction gave petitioner adequate notice of the practices from which it was required to refrain: providing unequal pay to male and female employees whose work requires substantially equal skill, effort, and responsibility. Contrary to petitioner's assertion, the injunction does not expose it to the "risk" of contempt if it incorrectly evaluates job categories not at issue in the instant case; petitioner will "still be able to raise questions of law and of good faith as freely as in the original suit for an injunction" (*Mitchell* v. *Pidcock*, 299 F.2d 281, 287 (C.A. 5)).

3. Petitioner further contends (Pet. 18-19) that it was denied due process because the district court ruled against it from the bench at the conclusion of the evidence. Petitioner assumes that the court's ruling had been reduced to writing prior to the time when petitioner offered the testimony of two witnesses. But the record does not support this assumption; it is just as likely that the court was speaking extemporaneously or from notes taken during the presentation of petitioner's case. Thus there is no reason to suppose that the district court did not accord full and fair consideration to petitioner's evidence.

For the foregoing reasons, it is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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